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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

JERRY BROWN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I. Whether the district court abused its discretion in departing upward nine levels in sentencing Petitioner to life imprisonment on conduct initiated and orchestrated by the government?

II. Whether the government violated its plea agreement and understanding with defense counsel as to the offense level under which Petitioner would be sentenced?

III. Whether the district court erred in denying Petitioner a reduction for acceptance of responsibility under U.S.S.G. 3E1.1?

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No.

In The

# Supreme Court of the United States

October Term, 1995

JERRY BROWN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jerry Brown, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which denied the timely petition for rehearing in this matter on July 26, 1995.

## OPINION BELOW

On May 22, 1995, the Court of Appeals for the Eleventh Circuit affirmed the sentence of the Petitioner for one count of possession of methamphetamine with intent to distribute, in

violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The decision of the Eleventh Circuit was unpublished, and a copy of the slip decision is included with this petition as Appendix B. The Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* under Fed. R. App. P. 40 was denied on July 26, 1995. A copy of the order denying the Petition for Rehearing in the Court of Appeals is included as Appendix A.

## STATEMENT OF JURISDICTION

The order of the Court of Appeals for the Eleventh Circuit denying Mr. Brown's Petition for Rehearing was entered on July 26, 1995. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND FEDERAL PROVISIONS INVOLVED

**18 U.S.C. § 3553(b) provides:**

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing commission in formulating the guidelines that should result in a sentence different from that described.

***Santobello v. New York***, 404 U.S. 257 (1971), holds that a defendant is entitled to specific performance of an agreement which he enters with the government and which induces his plea of guilty.

**United States Sentencing Guideline 3E1.1** provides:

> **(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.**
>
> **(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:**
>
> > **(1) timely providing complete information to the government concerning his own involvement in the offense; or**
> >
> > **(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,**
>
> **decrease the offense level by 1 additional level.**

## STATEMENT OF THE CASE

On July 15, 1993, a federal grand jury charged Petitioner in a four-count indictment. In Count One, Petitioner was charged with possession with intent to distribute methamphetamine on

October 12, 1992, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. In Count Two, Petitioner was charged with possession with intent to distribute methamphetamine on October 20, 1992. In Count Three, Petitioner was charged with possession with intent to distribute methamphetamine on November 12, 1992. In Count Four, Petitioner was charged with possession with intent to distribute methamphetamine on January 7, 1993. R: I - 1 - 1-3.

Petitioner initially entered a plea of not guilty on August 25, 1993.

On January 31, 1994, Petitioner entered a change of plea as to Count One of the indictment. R: I - 42. Counts Two through Four were dismissed on the government's motion on June 9, 1994. This plea was entered under a plea agreement between the government and Petitioner, which was endorsed by both defense counsel and Petitioner. R: I - 41.

A presentence investigative report was prepared by U.S. Probation Officer Robert R. Long. Long also prepared an addendum to that report, both of which are included in the record as sealed Exhibits in Vol. I.

On June 9, 1994, The Honorable Wilbur D. Owens sentenced Petitioner to the custody of the U.S. Bureau of Prisons for life. R: I - 54 - 1-5.

Petitioner filed his Notice of Appeal on June 21, 1994. R: I - 55.

Petitioner is presently incarcerated at the United States Penitentiary in Terre Haute, Indiana.

On appeal before the Court of Appeals for the Eleventh Circuit, the Petitioner argued that the district court erred in

departing upward nine levels to sentence him to life imprisonment based on conduct initiated and orchestrated by the government. The Court of Appeals affirmed the sentence without opinion. (Appendix B, 3a). Petitioner's timely Petition for Rehearing under F.R.A.P. 40 was denied on July 26, 1995. (Appendix A, 1a)

## REASONS FOR GRANTING THE WRIT

### I.

### THE DISTRICT COURT ERRED IN MAKING A NINE-LEVEL UPWARD DEPARTURE IN SENTENCING PETITIONER TO LIFE IMPRISONMENT WHICH WAS UNREASONABLE UNDER THE GUIDELINES AND THE CIRCUMSTANCES OF PETITIONER'S CASE.

The district court's nine-level upward departure under authority of U.S.S.G. 5K2.0 in sentencing Petitioner to life imprisonment was unreasonable under the Guidelines and the facts and circumstances of Petitioner's case. Absent the departure, Petitioner would have been sentenced within a guideline range of 135-168 months or possibly lower if the government honored its plea agreement. The government through its agents initiated and orchestrated the conduct upon which the district court based its extreme and unreasonable departure.

In Paragraph 72 of the presentence investigation report (hereafter known as PSR), the Probation Officer enumerated as a factor possibly warranting departure under U.S.S.G. 5K2.0 that Petitioner "discussed the contract killings of five individuals with the undercover agent. He took significant steps to have four of the killings completed." R: I - Exhibit.

Both prior to and during the sentencing hearing, Petitioner denied any involvement with the so-called "contract killings," based upon defendant's counsel advising him no crime was committed because of the government's involvement. R: I - Exhibit -Addendum; R: III - 52. Defense counsel attempted to develop testimony from the DEA case agent, Ricky Royal, that the person initiating the conversations about "contract killings" was the government informant, Lee Delph (R: III - 17); that Petitioner was not the eager participant depicted by the government and in fact attempted to cancel the activity in light of his expressed desire "to think about it" (R: III - 19-20); that Petitioner withdrew completely from the "hits" on his ex-wife and Ronnie or Donnie Whitehead (R: III - 22-23); and that Mr. Delph initiated all the conversations about these "hits" (R: III - 28).

"The Guidelines establish sentencing ranges for cases included in the 'heartland [of] typical cases embodying the conduct that each guideline describes.' U.S.S.G. Cha. 1, Par. A, intro. comment. Departure from the Guidelines range should occur only in those atypical case beyond the 'heartland.' *Id.* Upward departure from the Guidelines range is permitted only when aggravating circumstances exist that were not adequately considered by the Sentencing Commission when it developed the Guidelines. 18 U.S.C. 3553(b)." *United States v. Alpert*, 28 F.3d 1104 (11th Cir. 1994).

When reviewing on appeal an upward departure under section 3553(b), a three-part test must be applied. "First, was the aggravating circumstance cited by the district court adequately taken into consideration by the Sentencing Commission in formulating the guidelines? *See* U.S. Sentencing Guidelines 5K2.0. Second, if adequate consideration was not given to the circumstance, was consideration of the circumstance consistent with the goals of the sentencing guidelines? ... If the

circumstance was properly taken into account, was the extent of the departure from the guideline range reasonable?" *United States v. Shuman*, 902 F.2d 873 (11th Cir. 1990).

**Was the aggravating circumstance cited by the district court adequately taken into consideration by the Sentencing Commission in formulating the guidelines?** In sentencing Petitioner, the district court stated that it had "concentrated and confined its thoughts to the possibility of an upward departure on account of the incident which the evidence indicates led the defendant to believe that he had succeeded in causing the murder of a Mr. Whitehead." R: III -48. That circumstance, the alleged solicitation of an undercover agent through a DEA informant to murder someone who owed him money and a potential witness against Petitioner, was not taken into consideration by the Sentencing Commission in formulating the guideline under which Petitioner was sentenced, U.S.S.G. 2D1.1.

While U.S.S.G. 2D1.1 provides for enhancement based on death resulting from the drug activity, that death must result from the "use of the substance."

The guideline most directly applicable in Petitioner's case would be U.S.S.G. 2A1.5, Solicitation to Commit Murder. The base offense level for that offense is 28. Since Petitioner allegedly offered something of pecuniary value for the killing — methamphetamine — there should be a four-level enhancement to a base offense level of 32. R: III - 10; 13. At Petitioner's Criminal History Level IV, that would result in a sentencing range of 168 to 210 months.

**If adequate consideration was not given to the circumstance, was consideration of the circumstance consistent with the goals of the sentencing guidelines?** Certainly, consideration of such conduct would be consistent

with the goals and purposes of the sentencing guidelines under the rationale used in *United States v. Ponder*, 963 F.2d 1506 (11th Cir. 1992). In *Ponder*, this Court opined that the social interest harmed by a violation of Section 841 is the interest in protecting society at large from the harmful effects of controlled substances. A differing societal interest would be impacted by the alleged solicitation to murder which the district court cited as the factor causing him to depart upward. Obviously in such a case, the societal interest would be the preservation of human life.

**If the circumstance was properly taken into account, was the extent of the departure from the guideline range reasonable?** In *Williams v. United States*, 112 S. Ct. 1112 (1992), the United States Supreme Court considered upward departures and adopted the same analysis utilized by this Court. In considering this third prong of the test, the Court wrote, "The reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing." *Williams, supra* at 1121. The Court expanded on that by offering, "[I]s the resulting sentence an unreasonably high or low departure from the relevant guideline range?" *Id.* at 1120.

Based on the calculations of the U.S. Probation Office, prior to the district court's departure, Petitioner would have sentenced under Base Offense Level 30, which under criminal history category IV would have yielded a range of 135 to 168 months.[1] R: III - 50. After the district court's nine-level upward departure, Petitioner was sentenced to life imprisonment "without parole." R: III - 50.

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1. Defense counsel would point out to the Court that the "best case scenario" for Petitioner would be as follows. Because the purity of the methamphetamine was so low, the proper base offense level would be 26. With a three-level decrease for acceptance of responsibility, Petitioner would be sentenced at base offense level 23 under criminal history category IV with a sentencing range of 70-87 months.

Petitioner would respectfully submit that this departure was unreasonable based on the Guidelines and on the facts of his case. Based on the figures alone, it is a steep climb indeed from 135 to 168 months to life without parole, particularly because Petitioner was 38 years old at the time at the time of sentencing. R: I - Exhibit - PSR. Defense counsel contends that such an extreme increase would arguably constitute cruel and unusual punishment within the prohibitions of the Eighth Amendment. This departure was made without any consideration of the appropriateness of the intervening levels, or without consideration (on the record) of the base offense level for the actual crime involved, solicitation to commit murder.

Petitioner notes that solicitation is the most appropriate charge because the other two participants in the alleged crime were a government undercover agent and a government informant. Defense counsel pointed out to the district court that Petitioner had attempted to withdraw from the agreement, which was reached after repeated contacts by the government informant. The same government informant and undercover agent repeatedly attempted to manipulate Petitioner into obtaining greater amounts of greater purity to increase his level of sentencing exposure. R: III - 49.

At the sentencing hearing, defense counsel attempted to develop testimony from the DEA case agent, Ricky Royal, that the person initiating the conversations about "contract killings" was the government informant, Lee Delph. R: III - 17. Defense counsel established that there was indication that Petitioner was not the eager participant depicted by the government and in fact wished to cancel the activity in light of his expressed desire "to think about it." R: III - 19-20. Petitioner completely withdrew from some of the "hits" proposed by Delph and the undercover agent on his ex-wife and Ronnie or Donnie Whitehead. R: III - 22-23. Discussions about the hits were initiated by Delph. R: III - 28.

Given the extent to which the conduct on which the district court rested its upward departure was initiated, spurred, and orchestrated by government agents (either official or unofficial), Petitioner would respectfully submit that the extent of the enhancement is unreasonable, if not outrageous. Petitioner would contend that the district court's nine-level upward departure was unreasonable on its face. Petitioner's sentence should be vacated and his case remanded for resentencing.

## II.

## THE GOVERNMENT VIOLATED ITS PLEA AGREEMENT AND UNDERSTANDING WITH DEFENSE COUNSEL AS TO THE OFFENSE LEVEL UNDER WHICH PETITIONER WOULD BE SENTENCED.

The government violated its plea agreement and understanding with defense counsel as to the offense level under which Petitioner would be sentenced. Since Petitioner pled guilty based on that understanding, his plea was involuntary, and he should have been allowed to withdraw his guilty plea prior to sentencing.

At the sentencing hearing, defense counsel noted that the instant plea agreement was given to him on the date that Petitioner pled, January 31, 1994. R: III - 42. This plea agreement was provided to him to replace an earlier draft of the agreement which contained a great many errors. R: III - 41-42.

Defense counsel stated that Petitioner had pled guilty with the understanding that his offense level would be 26 based on earlier conversations with the government and U.S. Probation Office. R: III - 42; 46. Defense counsel offered for the district court's consideration a letter from the Assistant U.S. Attorney dated October 19, 1993, which stated, "I received a call from the

probation office concerning computation of the guidelines. I was told that since the meth was not 100% pure, the appropriate level will be a level 26. This is consistent with the position that you took after you reviewed the guidelines. I am ready to proceed with Mr. Brown's Plea if he still desires to change his plea." R: I - 52 - Exhibit 3.[2]

The district court pointed out that Paragraph 11 of the plea agreement provided that nothing would limit the sentencing discretion of the court. R: III - 43. The government denied that there had been any stipulation of fact between it and defense counsel that the offense level would be limited to Level 26. R: III - 47.

Petitioner would contend that his case is similar to the fact situation in *United States v. Boatner,* 966 F.2d 1575 (11th Cir. 1992). In *Boatner,* the plea agreement provided an express stipulation of fact that two ounces of cocaine would be the only quantity considered for sentencing purposes. In the PSR and at sentencing, evidence was introduced of Boatner's participation in activities involving three kilograms of cocaine. Instead of granting Boatner's motion to strike or making any specific findings as to the amount of cocaine on which it based its sentence, the district court sentenced Boatner to eight years' imprisonment.

On appeal, Boatner's sentence was vacated and his case remanded for resentencing. The Eleventh Circuit concluded that Boatner's guilty plea was induced by the bargain he reached with the government, which was violated when the government

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2. The government's motion for continuance filed on November 2, 1993, stated in Paragraph 3, "The government and the defendant have reached an agreement whereby the defendant will enter a plea of guilty to count one of the indictment." R: I - 38-1.

provided information to probation of Boatner's involvement with greater quantities of cocaine than the stipulation provided.

This Court also specifically found that Paragraph 11 of the plea agreement providing that the district court was not bound by the government's recommendation, did not change its analysis. "Rule 11(e)(1)(B) does not change our analysis. The stipulation that, for sentencing purposes, Boatner's involvement with cocaine is limited to two ounces of cocaine is not an agreement to recommend a particular sentence. It is a stipulation of fact to which the government agreed under the terms of its Rule 11 agreement." *Boatner, supra* at 1578-1579.

The primary difference between *Boatner* and Petitioner's case is the absence of an express factual stipulation in the plea agreement. However, defense counsel relied on what he thought was his understanding of the government's position in entering Petitioner's plea on January 31, 1994, given the lateness of the submission of the corrected plea agreement. R: III - 42-43.

"Whether the government violated the agreement is judged according to the defendant's reasonable understanding at the time he entered his plea. *United States v. Nelson,* 837 F.2d 1519 (11th Cir. 1988) (citing *In re Arnett,* 804 F.2d 1200 (11th Cir. 1986)." *Boatner, supra* at 1578. While there was no express factual stipulation in the plea agreement between Petitioner and the government as to offense level, the clear expression from defense counsel at the sentencing hearing was that Petitioner entered his plea based on his understanding that he would be sentenced on Offense Level 26.

Petitioner would submit that the misunderstanding as to the offense level under which he was to be sentenced should be honored by having his present sentence vacated and his case remanded for resentencing. The absence of the express factual

stipulation based on the last-minute substitution of a plea agreement should not defeat Petitioner's understanding of the bargain on which his plea was entered.

## III.

## THE DISTRICT COURT ERRED IN DENYING PETITIONER A REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER U.S.S.G. 3E1.1.

The district court erred in denying Petitioner a reduction for acceptance of responsibility under U.S.S.G. 3E1.1.

Petitioner admitted his involvement in the conduct charged in the indictment and attempted to cooperate with the government, which rejected his proffers of information, although it had led him to believe his help was useful for several months.

In Paragraph 22 of the PSR, the Probation Officer contended that because Petitioner disputed his involvement in drug trafficking beyond that charged in the indictment and in the discussions of contract killings initiated by government agents, he should be denied a three-level reduction for acceptance of responsibility under U.S.S.G. 3E1.1.

In *United States v. Johnson*, 906 F.2d 1285 (8th Cir. 1990), the government contended that the defendant's challenge to an increase for being manager or supervisor should have forfeited his reduction for acceptance of responsibility. The district court in that case observed that while the defendant was unwilling to accept responsibility for the totality of the jury's verdict, he did admit to substantial involvement.

Similarly in this case, while Petitioner adamantly contested the scope and quantities of drug trafficking attributed to him in

the PSR and his involvement in the "contract killings" initiated by Lee Delph[3] (R: I - Exhibit - PSR & Addendum), Petitioner did plead to Count One of the indictment and did not contest the quantity of methamphetamine attributed to him in the indictment. Unlike Petitioner Johnson in *United States v. Saget*, 991 F.2d 702 (11th Cir. 1993), there was no jury verdict in Petitioner's case.

Further, Petitioner attempted to cooperate with the government and furnish information himself and on behalf of himself through his defense counsel. R: III - 26-28. His efforts were rejected by the government for the stated reason that Petitioner was providing them with information they already had, although this reason was not communicated to Petitioner for several months after he entered his guilty plea. R: III - 16-17; 26.

For whatever reason, the government has chosen to credit the accounts of its informant Lee Delph — an admitted murderer[4] —over the information and cooperation offered by Petitioner. Petitioner would contend that this conduct was patently unfair and destroyed any opportunity he had of helping himself through cooperation with the government and receiving a reduction in offense level through credit for acceptance of responsibility under U.S.S.G. 3E1.1.

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3. Defense counsel advised Petitioner that there could be no conspiracy to commit a murder when the other two parties involved were government agents.

4. *See* DEA Agent Royal's testimony at R: III - 30.

## CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

J. MICHAEL CRANFORD
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**APPENDIX A — DENIAL OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 26, 1995**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8695

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JERRY LEE BROWN,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF HEARING EN BANC

Before: DUBINA and BARKETT, Circuit Judges and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit

*Appendix A*

Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

* * *

ENTERED FOR THE COURT:

s/ Jack F. Dubina
UNITED STATES CIRCUIT JUDGE

**APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 18, 1995**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8695
Non-Argument Calendar

D.C. Docket No. CR 93-50-MAC (WDO)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JERRY LEE BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(May 18, 1995)

Before DUBINA and BARKETT, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

Entered: May 18, 1995
For the Court: Miguel J. Cortez,

*Appendix B*

by: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/7/95

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF GEORGIA, MACON DIVISION FILED JUNE 20, 1994

UNITED STATES DISTRICT COURT
Middle District of Georgia
Macon Division

Case Number CR 93-50-MAC(WDO)

UNITED STATES OF AMERICA

v.

JERRY LEE BROWN

Defendant.

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

The defendant, JERRY LEE BROWN, was represented by J. Michael Cranford, P.O. Box 3324, Macon, GA 31205.

The defendant pleaded guilty to count(s) 1. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section
*21:841(a)(1) & 18:2*

Nature of Offense
*Possess w/intent to distr. a SCH II CRTRL SUB, methamphetamine*

*Appendix C*

Date Offense Concluded
*10/12/92*

Count Number(s)
*1*

As pronounced on June 9, 1994, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s), 1 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

On motion of the United States the court has dismissed count(s) 2-4.

Signed this the 20th day of June, 1994.

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

Defendant's SSAN: 259-92-8434
Defendant's Date of Birth: 8/11/55
Defendant's address: Rt. 6, Box 709, General Twiggs Dr.
Macon, GA 31201

*Appendix C*

[page 2]

**IMPRISONMENT**

**The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of the defendant's LIFE.**

**The defendant is remanded to the custody of the United States Marshal.**

**RETURN**

**I have executed this Judgment as follows:**

_____

_____

_____

_____

**Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.**

_____
**United States Marshall**

**By**_____
**Deputy Marshall**

*Appendix C*

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## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not own or possess a firearm, destructive device or dangerous weapon.

3. Defendant shall participate in a program approved by the U.S. Probation Office for urinalysis testing, which program may include testing to determine whether defendant has reverted to the use of drugs or alcohol and, if necessary, treatment for alcohol or drug dependency as directed by the U.S. Probation Office.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

*Appendix C*

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged

in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

[page 4]

**FINE**

It is the Court's judgment that the defendant is unable and not likely to become able to pay all or part of a fine even with the use of a reasonable installment schedule; therefore, the Court waives the fine as well as any alternative sanctions in this case. The Court is also waiving the additional fine requiring that defendant pay the cost of imprisonment and/or supervision fee.

*Appendix C*

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed See 18 U.S.C. § 3614.

[page 5]

**STATEMENT OF REASONS**

The court adopts the factual findings and guideline application in the presentence report except: The Court finds that the total amount of drugs attributable to the defendant is 280 grams of methamphetamine instead of 24 pounds of methamphetamine and 2-1/2 pounds of powder cocaine.

**Guideline Range Determined by the Court (Prior to Departure):**

| | |
|---|---|
| Total Offense Level: | 30 |
| Criminal History Category: | IV |
| Imprisonment Range: | 135 Months to 168 months |
| Supervised Release Range: | 5 years |
| Fine Range: | $15,000 to $4,000,000 |
| Restitution: | $N/A |

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence departs from the guideline range for the following reason(s): The Court determines that an upward departure is warranted pursuant to U.S.S.G. 5K2.0 because there exists aggravating circumstances which the Sentencing Commission did not adequately take into consideration in formulating the guidelines. The defendant attempted to arrange

**the murder of multiple persons who had knowledge of his drug distribution and he actually believed one of the murders had occurred after viewing a photograph of the alleged victim provided by a government informant. Based on these findings, the Court determines that an upward departure of 9 levels to a total offense level of 39 which results in a guideline sentencing range of 360 months to LIFE appropriately reflects to totality of the defendant's extreme conduct in this offense. The departure also results in a fine range of $25,000 to $4,000,000.**

## APPENDIX D — EXCERPTS OF SENTENCING HEARING DATED JUNE 3 AND 9, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Crim. #93-50- Mac (WDO)

UNITED STATES OF AMERICA

VS.

JERRY L. BROWN

SENTENCING HEARING

IN MACON, GEORGIA, JUNE 3 and 9, 1994

HON. WILBUR D. OWENS, JR., U.S. District Judge, Presiding

APPEARANCES:

For the Government:
MR. CHARLES CALHOUN
Assistant U.S. Attorney
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Macon, Georgia 31202

For the Defendant:
MR. J. MICHAEL CRANFORD
Attorney at Law
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Macon, Georgia 31205

*Appendix D*

* * *

[49] evidence to dispute that situation, Mr. Cranford?

MR. CRANFORD: Your Honor, the only evidence that I have presented to this Court is the fact that on several occasions Mr. Brown tried to come out from under this conspiracy as it were. He tried to back out of it. He was in, he couldn't get out. And we also in our proffer and the evidence that we tried to present to the Court tried to show the Court that the only people involved, besides Mr. Brown, was the government and that all of this was done at the direction of the government, and we're just asking you to take that into consideration. Our position, if Mr. Delph had've never come to Mr. Brown's house, none of this would've ever happened. There would've been no crime. We think that the government's conduct is — borders on being outrageous. They're the ones that initiated these contacts. They're the ones that initiated the crime. They're the ones that set up the terms for the contract hit. They're the ones that set up the amount of buys. If you've read those transcripts, you've seen where they tried to entice Mr. Brown into getting more and purer quantities and qualities of drugs in order to raise his level of exposure up. We think that the Judge should certainly consider the government's involvement in this action before you consider anything else.

THE COURT: All right, sir. Well, I think I've made all the findings of fact that are necessary to be made, [50] so would you and the defendant come forward, please.

Mr. Brown, it's the Court's determination that the total beginning offense level in your case is 30 and your criminal history category is IV, which yields a beginning guideline sentencing range of 135 to 168 months.

*Appendix D*

Further, pursuant to Guideline Section 5K2, the Court also determines that an upward departure is warranted in your case as the sentencing guidelines do not adequately take into consideration the aggravating circumstances of the attempted contract murder that you believed had been accomplished or the additional multiple murders that you attempted to arrange. Therefore, pursuant to 5K2, the Court is structuring a departure by moving incrementally down the sentencing table in the criminal history category of IV to find a guideline range which is appropriate in your case. Having done that, the Court makes an upward departure of nine levels to a total offense level of 39 and a criminal history category of IV, which yields a guideline sentencing range of 360 months to life. And the Court then commits you to the Bureau of Prisons for life without parole. If you're ever released, that sentence shall be followed by a term of supervised release of five years, to include the standard and the mandatory conditions, as well as the special conditions that you shall not possess any firearm or other dangerous weapon and shall participate in a program approved by the [51] Probation Office of urinalysis testing and if necessary for the treatment of alcohol or drug addiction or dependency.

There's a mandatory assessment of $50. It's the Court's judgment that you're not able or likely to become able to pay all or any part of a fine, even with a reasonable installment schedule. So the Court waives the fine, as well as the alternative sanctions that could require you to pay the cost of your own imprisonment and supervision.

The sentencing range which has resulted from the Court's computation of your guidelines gives an appropriate sentence. It's the Court's judgment that that sentence is within the departure range that is consistent with the philosophy of guideline sentencing.

*Appendix D*

Your range exceeded twenty-four months. The Court, in arriving at the top of the range, carefully considered all that the Court has been presented about you, all that the evidence shows that you have done.

Now that the Court has made it's findings and imposed sentence, is there any objection, other than as already stated?

MR. CRANFORD: Your Honor, we specifically object to the Level 30, Your Honor, to the upward departure and I object to you not taking into consideration the FK2.12 which gives rise to the coercive and duress that was involved in this case. We feel like even if Your Honor considered the

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